Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses	)	MM Docket No. 97-234
	)	
Reexamination of the Policy Statement on Comparative Broadcast Hearings	)	GC Docket No. 92-52
	)	
Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases	)	GEN Docket No. 90-264

PETITION FOR RECONSIDERATION

Breeze Broadcasting Co., Ltd. ("Breeze"), by counsel, hereby petitions for reconsideration of the FCC's *First Report and Order* ("*Report and Order*") in the captioned proceeding.[1] Specifically, this Petition address the procedures the Commission should apply in comparative licensing cases (pre-July 1, 1997) for which a hearing has been held, the record has closed, an Administrative Law Judge has issued an Initial Decision ("ID"), the *ID* has been affirmed by the Review Board, and a timely filed Settlement Agreement among remaining qualified applications is before the Commission.

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[1] 63 FR 176 (September 11, 1998).

I. INTRODUCTION

In the *Notice of Proposed Rulemaking*, FCC 97-397, released November 26, 1997 ("*NPRM*") the Commission tentatively proposed the use of auctions to resolve pending licensing proceedings that are within the scope of 47 U.S.C. § 309(l). However, at Paragraph 22 of the *NPRM*, the FCC countenanced a "subset" of such applications which "progressed to either an Initial Decision by an ALJ or a decision by the former Review Board, before the court found in *Bechtel II* that the integration criterion used by the Commission was unlawful." The *NPRM* invited comment as to whether, considering "the resources these applicants have expended, as well as the delays they have encountered," auctions would be inappropriate.

The *NPRM* did not discuss the unusual case, at issue here, where one of the applicants has been disqualified, the Review Board has affirmed the ID, and the remaining parties have entered into a timely filed Settlement Agreement. Significantly, however, the *NPRM* did tentatively construe Section 309(l)(3) -- the statutory waiver provision -- as applying to any settlement among pre-July 1, 1997 applicants, even if all the applicants are not parties to the agreement. *NPRM*, ¶27. Moreover, the *NPRM* specifically qualified the FCC's proposed treatment of "cases already designated for hearing," to apply only where a settlement *had not been filed*. *NPRM* ¶30 (emphasis added).

II. THE *REPORT AND ORDER*

In the *Report and Order*, the FCC "reiterate[d]" -- over the contrary suggestions of several commentors -- that timely filed Section 309(l)(3) settlements were valid and ripe for

action "even if all the applicants are not parties to the agreement." *Id.* ¶73. A case which illustrates this attribute is the Gulf Breeze, Florida FM proceeding. There, both the ALJ and the Review Board determined that J. McCarthy Miller was not financially qualified to construct and operate the Gulf Breeze station. The two remaining qualified applicants filed a Joint Petition for Approval of Settlement Agreement on December 29, 1997.

Thus, the Gulf Breeze settlement was procedurally sound when it was filed nine months ago, and remains grantable today. Accordingly, the settlement request should be granted promptly. In that event, of course, this reconsideration petition would be rendered moot.

Although prompt grant of the pending settlement is appropriate, Breeze is concerned that certain language in the *Report and Order* might be construed as posing an obstacle to approval of the joint request. For instance, at ¶52, the Commission decides that, "even for the small number of cases that have progressed at least through an initial decision," such cases will be resolved by auction. This passage does not expressly except from its scope the situation where a settlement between all qualified applicants is currently under review by the Office of General Counsel. In light of the language of ¶73, previously noted, Breeze assumes that the *Report and Order* does not make this distinction because it is obvious, and because a contrary position would conflict with ¶52. Indeed, this interpretation -- required by a basic canon of statutory interpretation -- is further validated by prefatory language in ¶51 and in Footnote 52. There the FCC expressly separated from the category of "pending hearing cases" those for which Section 309(l)(3) settlements were timely filed.

For these reasons, a rational rendering of the *Report and Order* will countenance FCC grant of the settlement proposal in the unique circumstances we have described.

The Gulf Breeze case is thus an excellent illustration of a virtue of the hearing process -- the exposure of a financially unqualified applicant. Because the hearing has "done its work" by yielding decisional information about a party that has shown itself ineligible to be an FCC licensee, it would be senseless if the FCC were to ignore this history by sending these applicants to auction. If auctions were, nonetheless, applied to this subset of applicants, the FCC erred in the *Report and Order* in neglecting to adopt a rule that a financially unqualified applicant is not eligible to participate.

Where a comparative hearing has been held already -- and particularly where one of the parties has demonstrated itself to be a financially unqualified applicant -- it is clear that the hearing process has performed a valuable function. Regardless what approach the Commission may wish to take with respect to applicants not yet proven to be financially qualified, in no event should an applicant that has been found financially unqualified be allowed to acquire an FCC license.

Considering (1) the resources expended, both by the applicants and by the FCC; (2) the good faith efforts of the qualified applicants to eliminate the comparative issue from the case by settlement; and (3) that the "crucible" of the hearing process produced critical information as to Miller's eligibility to hold a license, it is unnecessary for the FCC to subject the applicants to an auction.

Breeze urged the retention of the comparative criteria in comments it submitted in GC Docket 92-52. It continues to believe that a judicially-sustainable formulation of the criteria can be created. But whatever approach the Commission were to fashion as applicable to the subset of cases under discussion here, the Gulf Breeze proceeding and others like it have proceeded too far to subject the applicants to an auction. By this, we mean not just that the equities favor retention of a comparative schema as to these applicants, but -- more fundamentally -- prudential considerations dictate this result. The FCC will most effectively promote the public interest by taking advantage of *the value* the hearing in this case has created. Indeed, to ignore that value would be capricious.

This is obvious if we compare the prospect of the Commission's permitting a disqualified applicant such as Miller from participating in an auction, to the FCC's simply acting on the settlement proposal which is now before it. If the settlement proposal is granted, the permittee will move expeditiously to construct the new station and begin broadcast service. By contrast, the petition to deny procedure adopted by the Commission in the *Report and Order* would, in such a case, lead to protracted and senselessly duplicative litigation of issues which an Administrative Law Judge and members of the former Review Board have long since exhaustively reviewed.

As Breeze noted in its comments in the rulemaking, adoption of a rule that precludes a financially unqualified applicant from auction participation is appropriate for two reasons: *(A)* such a rule will further the FCC's statutory duty to advance the public interest and

implement new Section 309(l) in a rational way; and *(B)* the rule will comport with all requirements of due process.

Public Interest Considerations. The "paramount" interest in administrative proceedings is that of the public, and the "interests of private litigants must give way to the realization of public purposes." *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958). It is axiomatic that the issue of an applicant's financial ability to construct and operate a broadcast station is fundamental to the public interest. Obviously, the nexus between these two dimensions would be broken if a financially unqualified applicant were deemed eligible to participate in an auction. Thus, there cannot be any genuine dispute that the rule advocated by Breeze would serve the public interest by promoting the long-settled principles discussed above.

The public interest would be served in another way. The Congress as well as the FCC have repeatedly determined that a virtue of auctions is more rapid delivery of new service to the public, one of the FCC's principal statutory objectives. *See, e.g., Marlin Broadcasting of Central Florida, Inc.*, 5 FCC RCD 5751 (1990) (objective of providing communications service to the public in the most efficient, expeditious manner possible carries substantial weight in balancing analysis); *Sutton v. City of Milwaukee*, 672 F.2d 644, 645-46 (7th Cir. 1982). If a financially unqualified applicant were allowed to participate in an auction, however, this objective would be undermined, as we discuss in detail *infra*.

Moreover, the FCC's general competitive bidding rules provide that if the winning bidder is ultimately found to be unqualified to be a licensee, the Commission would conduct

another auction for the license and this would require that it afford *new parties* an opportunity to file applications for the license. *See* 47 C.F.R. § 1.2109(c); NPRM at ¶ 69. This would be egregiously prejudicial to the other parties in the case. To avoid the quagmire of that issue, the Commission should, at a minimum, preclude applicants such as Miller -- who have been proven unqualified -- from auction participation.

Rationality. There can be little question that a rule precluding a financially unqualified applicant from auction participation would satisfy the requirements of rationality. Clearly, defining the class of eligible auction participants by, *inter alia*, excluding a financially unqualified applicant, is reasonably related to the FCC's statutorily-imposed duty to act in the public interest. Again, the Gulf Breeze case illustrates this point clearly. An extensive and thorough hearing produced compelling evidence that Miller, at the time he certified his financial ability, lacked the requisite financial qualifications to fund the various projects to which he was committed. For this reason, it was not necessary for the ALJ to try the concomitant false certification issue.

The approach urged herein would thus pass judicial review under such governing precedents as *NLRB v. Food and Commercial Workers*, 484 U.S. 112, 123 (1987) (agency given deference "as long as its interpretation is rational and consistent with statute"); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (agency regulations given deference "unless they are arbitrary, capricious, or manifestly contrary to the statute); *see also E.E.O.C. v. Commercial Office Products Co.*, 486 U.S. 107 (1988).

Because this resolution would promote the public interest and at the same time satisfy the requirements of rationality, it should be adopted unless there were a countervailing concern that a financially unqualified applicant's due process rights would be compromised if it were denied the privilege to participate in an auction. As shown below, no such concern arises.

Due Process Consideration. Under the familiar test of *Mathews v. Eldridge*, the question of whether a rule denying a financially unqualified applicant the privilege of participating in an auction turns on (1) the nature of the private interest at stake and the risk of an erroneous deprivation of that interest through the procedure used; and (2) the nature of the Government's interest. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

The nature of a financially unqualified applicant's interest in participating in an auction; the risk of deprivation of any such interest. Here, of course, the threshold question is whether a financially unqualified applicant has *any* cognizable interest that requires special protection. It does not. As the FCC correctly observes in the *NPRM*, its authority to adopt a new rule does not depend on an applicant's expectations, but on whether the rule is arbitrary or capricious. *See NPRM* at ¶ 14, citing *DIRECTV v. FCC*, 110 F.3d 816, 825-26 (D.C. Cir. 1997). *See also*, our previous discussion in Section II *supra*. Thus, a financially unqualified applicant would not have a viable due process claim that a constitutionally-protected interest lay in its expectation of the ability to participate in the auction.

Moreover, considering the nature of the findings made by the ALJ in the Initial Decision and upheld by the Review Board in the Gulf Breeze case, it strains reason to think

that such a defect would not *eo ipso* render Miller ineligible for participation in the auction. Of course, there is always the theoretical possibility that Miller could successfully appeal the adverse findings. But this does not in any way enlarge Miller's interest. It is well established that whatever the outcome of an auction, that outcome is subject to judicial review. Thus, Miller's due process rights are protected in either event. *See, e.g., Auction of IVDS Licenses*, 6 CR 134 (Wireless. Bur. 1997) (licenses awarded at re-auction would be, as a matter of law, subject to the outcome of court cases); *Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 735-36 (D.C. Cir. 1976) (grant of licenses are subject to judicial review and obligation of FCC to give effect to court's judgement).

The Countervailing Interest of the Government. Permitting a financially unqualified applicant to participate in an auction would plainly violate the governmental interest in licensing broadcast facilities to parties who can be relied upon to be truthful with the agency that regulates them. Beyond this key factor, allowing the participation of a financially unqualified applicant virtually guarantees unnecessary delay in the advent of the new broadcast service to the public. A tainted applicant, if it were the high bidder at the auction, obviously could not proceed to become a licensee without *some manner* of additional inquiry. That procedure, even if it were defensible on other grounds (and we cannot imagine what such grounds would be) would cause delays that Breeze's solution would avoid.

Finally, permitting participation in an auction by an applicant which has been disqualified both by an Administrative Law Judge and three members of the former Review Board correlatively prejudices the due process rights of qualified applicants who have entered into

a settlement agreement which was wholly consistent with the FCC's rules at the time the settlement was filed, and with the rules as adopted in the *Report and Order*.

* * *

III. CONCLUSION

For the foregoing reasons, we urge the Commission to confirm the validity of a settlement proposal having the characteristics discussed herein, and reconsider the *Report and Order* to that extent.

Respectfully submitted,

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